

**QUESTIONS SE RAPPORTANT À L'ESQUISSE D'UN PROJET DE CONVENTION
SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES
ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

préparé par le Bureau Permanent

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**ISSUES ARISING UNDER THE TENTATIVE DRAFT CONVENTION ON THE
INTERNATIONAL RECOVERY OF CHILD SUPPORT AND
OTHER FORMS OF FAMILY MAINTENANCE**

prepared by Permanent Bureau

*Document préliminaire No 21 de juin 2006
à l'intention de la Commission spéciale de juin 2006
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille*

*Preliminary Document No 21 of June 2006
for the attention of the Special Commission of June 2006
on the International Recovery of Child Support
and other Forms of Family Maintenance*

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INTRODUCTION

The focus of this document is the text of the Tentative Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance (Prel. Doc. No 16). An effort is made to summarise the issues that remain to be addressed / decided within the Special Commission. The issues emerge from several sources:

- (a) the text itself, in which options are sometimes expressed, square brackets are employed to indicate text which is tentative or has not yet been fully considered, and footnotes are used to describe issues identified by the Drafting Committee;
- (b) the comments of States and Organisations on the Tentative Draft Convention, which are to be found in Preliminary Document No 23;
- (c) the Report of the Forms Working Group (Prel. Doc. No 17), the Document on Co-ordination between the Maintenance Project and other International Instruments (Prel. Doc. No 18) and the Report of the Administrative Co-operation Working Group (Prel. Doc. No 19); Form of the Rules on Applicable Law and Possible Final Clauses (Prel. Doc. No 20) and the Report of the Working Group on Applicable Law (Prel. Doc. No 22);
- (d) comments made by the Chair of the Drafting Committee;
- (e) other consultations carried out by the Permanent Bureau.

The document is set out in two parts. Part I follows the headings of the Draft Agenda prepared by the Permanent Bureau. Part II addresses issues that are not covered by the Draft Agenda.

Three columns are used in setting out the issues. The first column sets out the relevant Article in the Tentative Draft Convention. The second column identifies the issue. The third column indicates which States have comments (Prel. Doc. No 23) on the particular issue and which other sources are relevant.

PART I – ITEMS ON DRAFT AGENDA

1. Scope and reservations on scope

Articles 2 and 44	<p>In respect of Chapters II and III (Administrative Co-operation and Applications), is there agreement that a State may reserve in respect of any maintenance obligations other than “child support”?</p> <p>In respect of Chapter V (Recognition and Enforcement) and other Chapters, should the possible range of reservation be narrower? (<i>E.g.</i> Any maintenance obligation other than child support or spousal support.</p>	See generally comments of United States of America and Norway
Article 44	<p>For the purposes of Article 44 should the definition of child (under 18) be expanded?</p> <p>For the purposes of co-ordination with other instruments:</p> <ul style="list-style-type: none"> - should the age of the child be modified to 21, and - should there be a requirement that reservations be specified? 	<p>See Footnote 45</p> <p>See Preliminary Document No 18, paragraph 19</p>
Article 2(1)	Should the brackets or the bracketed language be removed from Article 2, paragraph 1? Would removal of the bracketed language make any difference in substance?	United States of America
Article 2(2)	Suggestion for redrafting.	Canada

2. Central Authority functions

Article 6(1) <i>b</i>)	Is it sufficiently clear that, as in the New York Convention (Art. 6(1)), the requested Central Authority may represent the applicant?	See Preliminary Document No 18, Footnote 16. See also Working Document No 83 of the German Institute for Youth Human Services and Family Law.
Article 6.2	<p>Are there any general concerns about the extent of the functions to be carried out by Central Authorities?</p> <p>General suggestions for redrafting.</p>	<p>Switzerland / United States of America</p> <p>Germany – Working Document No 82 / Canada</p>

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Article 6(2)	Bracketed language in: <ul style="list-style-type: none"> - Paragraph 2, <i>chapeau</i> - Paragraph 2 <i>f)</i> - Paragraph 2 <i>i)</i> and <i>j)</i> - Paragraph 2 <i>h)</i> – Is any modification needed? - Paragraph 2 <i>b)</i> and <i>c)</i> 	United States of America / New Zealand / Canada United States of America / New Zealand United States of America / New Zealand / Canada Japan / New Zealand / Switzerland / Canada Norway
Article 7	Bracketed language	United States of America / Switzerland

3. Application through Central Authority

Article 9	Should a direct application to the requested Central Authority be possible in some cases? If so, will all the provisions relating to applications apply (<i>i.e.</i> 11, 12(3), (4), (8), 13, 33-40)? Definition of “requesting State” for the purpose of Article 9 (see Art. 3[e]). Are additional provisions needed on the relationship between the requested Central Authority and the applicant?	United States of America Preliminary Document No 17, paragraph 8 United States of America Working Document No 83 of the German Institute for Youth Human Services and Family Law.
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4. Available applications

Article 10(1) <i>a)</i>	Is it clear that the “applications” referred to in Article 10 are applications through Central Authorities? Does the wording of Article 10 allow direct applications to a competent authority? Should the term “application be replaced by “request” (Also in Article 11)	United States of America Japan
Article 10(1) <i>c)</i>	Should the final clause be deleted?	Japan

Article 10(1) <i>c)</i>	Should the brackets be removed?	United States of America
Article 10(2)	Should an application be available to a potential debtor for the establishment of a decision? (Footnote 9)	United States of America
Article 10(2) <i>b)</i>	Should this be deleted?	Mexico
Article 10(1) <i>e) f)</i> and 10(2) <i>a) and b)</i>	Is the reference to the law of the requested State acceptable?	Switzerland

5. Application contents and forms

Article 11	<p>Mandatory or recommended forms? Option 1 or 2?</p> <p>Bracketed language in Option 1:</p> <ul style="list-style-type: none"> - Paragraph 1 <i>b)</i> - Should "address" be included in the form? - Paragraph 11.1 <i>f)</i> - Paragraph 11.1 <i>g)</i> - Paragraph 11.2 <i>c)</i> 	<p>See generally the recommendations of the Forms Working Group, Preliminary Document No 17, paragraph 11</p> <p>Japan / United States of America / New Zealand / Switzerland</p> <p>Preliminary Document No 17, pp. 4 and 11-13</p> <p>Preliminary Document No 17, paragraph 8</p> <p>United States of America</p> <p>United States of America</p> <p>United States of America</p>
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6. Processing of applications

Article 12(2)	Transmittal Form set out in Annex to Convention	
Article 12(3)	Acknowledgment of Receipt Form – to be set out in Annex to Convention?	See Working Group on Forms
Article 12(4)	Removal of brackets?	New Zealand / United States of America

Article 12(8)	Removal of brackets? Modify wording?	New Zealand / United States of America Mexico
Article 12	Should a judicial authority seised with a case be obliged to provide information concerning progress?	Switzerland

7. Central Authority costs

Article 8	Should the words "including the processing of applications" be deleted in paragraph 1? Should paragraph 2 be deleted? Should the wording of paragraph 2 be modified to improve clarity?	Canada United States of America New Zealand
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8. Effective access

<p>Article 13</p>	<p>Issues have been raised (for different reasons) about the adequacy in general of Article 13, and in particular paragraphs 2 to 5. Among the questions that may be addressed are:</p> <p>Should paragraphs 2, 3, 4 or 5 be deleted?</p> <p>Should the wording of paragraph 1 be modified?</p> <p>Should the wording of paragraph 5 be modified?</p> <p>Should the wording of paragraph 7 be modified?</p> <p>Should paragraphs 3 and 7 apply to debtors?</p> <p>Should Article 13 apply in whole or in part to applications by public bodies?</p> <p>Should Article 13 apply in whole or in part to applications (<i>e.g.</i> for recognition and enforcement) made directly to the competent authority in the requested State (<i>i.e.</i> not through the Central Authority)?</p> <p>Should the general principle of effective access apply explicitly to procedures for enforcement under national law?</p> <p>Should Contracting States be required to describe how they will comply with the obligations to provide effective access? (To be dealt with under next item on the Agenda.)</p>	<p>Japan / New Zealand / United States of America</p> <p>Japan (Paragraphs 2, 3 and 5) / Canada (Paragraphs 3, 4 and 5)</p> <p>Canada</p> <p>United States of America (refers to Footnote 19)</p> <p>Footnote 19 / Canada / United States of America</p> <p>See Footnote 18 United States of America</p> <p>See Footnote 18 United States of America</p> <p>See Report of ACWG, and paragraph 9 below</p>
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9. Proposals of the Administrative Co-operation Working Group

<p>Article 4(1) and 4(3)</p> <p>Article 5 <i>b</i>)</p> <p>Article 6(2)</p> <p>Article 13</p> <p>Article 32</p>	<p>Proposals concerning information to be supplied by States at the time of ratification, accession or entry into force of the Convention:</p> <p>Designation of Central Authority, contact details and extent of functions.</p> <p>Provision of information on laws and procedures concerning maintenance obligations.</p> <p>Description of measures to be taken to meet obligations under Article 6(2). Proposed Article 5 <i>c</i>) <i>bis</i>.</p> <p>Description of how effective access to procedures will be provided under Article 13.</p> <p>Suggested amendment to the language of Article 32.5.</p>	<p>Report of the Administrative Co-operation Working Group (Prel. Doc. No 19), which includes the Report of the Monitoring and Review Sub-committee and the Report of the Country Profile Sub-committee</p>
<p>Chapter VIII</p>	<p>Proposal to add new Article concerning use of the Country Profile.</p>	
	<p>Further issues raised in Country Profile Report, paragraph 8.</p>	
	<p>Proposal for a "Central Authority Co-operation Committee".</p>	

10. Bases for recognition and enforcement

Article 16	Is "residence" or "habitual residence" to be used as a connecting factor?	United States of America
Article 16(1) <i>b</i>)	Should the wording be clarified?	New Zealand
Article 16(1) <i>e</i>)	Should the brackets be removed? Is the further elaboration of the words "in writing" needed?	New Zealand / United States of America New Zealand
Article 16(1) <i>f</i>)	Should the brackets be removed?	Japan / New Zealand / United States of America
Article 16(2)	Should a reservation be possible in respect of 1 <i>e</i>) or <i>f</i>)? Should a reservation be possible also in respect of 1 <i>d</i>)?	United States of America Canada
Article 16(3)	Should the word "factual" be retained? Should the reference to fact-based jurisdiction appear in paragraph 1 instead of paragraph 3? For States making the reservation under paragraph 2, should there be an obligation to list in a declaration the bases of jurisdiction which they accept in addition to those listed in paragraph 1	United States of America Japan See Footnote 23 and Working Document No 63
Article 16(4)	Is clarification / redrafting of the second sentence needed?	Japan / United States of America
Article 16(5)	Is this principle acceptable? Should the brackets be deleted? Should this principle be restricted to cases involving maintenance obligations of parents towards children (in terms of Article 44)?	Japan Footnote 24
Article 16(6)	Is this revision needed?	Japan

11. Grounds for refusing recognition and enforcement

Article 18 <i>b</i>)	Should the brackets be removed? Is a drafting change needed?	Mexico
Article 18 <i>e</i>)	Is this too restrictive?	Switzerland

12. Procedure on an application for recognition and enforcement

Article 19	See generally the flow chart, which appears as Annex A to the Report of the Administrative Co-operation Working Group. See general comments.	Preliminary Document No 19 Canada
Article 19(2)	Following the word "determination", where it appears in Article 19(2), and other paragraphs, should the expression "or for registration for recognition and enforcement" be added?	United States of America
Article 19(4)	What should be the bases for <i>ex officio</i> review at this stage – Articles 16 and 18 or Article 18 <i>a</i>) alone? Should there be any difference in the bases for <i>ex officio</i> review between "applications" processed through a Central Authority and "requests" made directly to the competent authority in the requested State? Should a provision be added making it clear that the decision may not be enforced until the period allowed for appeal or challenge has expired? Is it satisfactory that at this stage the applicant and respondent are not entitled to make submissions?	Japan / United States of America / New Zealand / Switzerland New Zealand Japan Japan
Article 19(5) and Article 19(7)	Is the language in paragraph 5 (<i>e.g.</i> the reference to appeal on ground[s] of [fact and] law) consistent with paragraph 7? Should further language be added to paragraph 5? Should paragraphs 5 and 7 be merged?	New Zealand Japan New Zealand

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Article 19(6)	Should this provision be deleted, or the time periods left to national law? Are the time periods in brackets acceptable or should they be modified?	Japan / Mexico United States of America
Article 19(8)	Should this Article be deleted? Should a provision be added requiring prompt notification to the respondent of the decision following challenge or appeal?	Japan United States of America
Article 19(2) and (3)	Should the procedure take account of efforts to achieve an amicable resolution?	Switzerland
Article 19(9)	Should the brackets be removed? Should a provision be added prohibiting a stay or suspension of enforcement while an appeal under this paragraph is pending?	New Zealand / United States of America Footnote 26

13. Direct applications for recognition and enforcement (Article 15(5))

Article 15(5)	Should the word "request" rather than "application" be used (here and other places) in relation to a direct application to the competent authority in the requested State (<i>i.e.</i> one not channelled through a Central Authority)? Should the Article 19 procedure (with the exception of 19(2)) apply fully to direct applications? (See above under 19(4).) Is any further provision required as a result of the exclusion of direct applications from Article 19(2)? Should Article 36 apply to direct applications?	United States of America New Zealand / United States of America See Footnote 22
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14. Documentary requirements (Article 20) and the use of mandatory / recommended forms in proceedings for recognition and enforcement

Article 20 a)	Is the first (original decision) or second (abstract of decision) alternative preferred, or is a compromise possible? In the first alternative, should the requirement refer simply to "a maintenance decision"?	New Zealand / United States of America / Switzerland / Canada Footnote 28
Article 20 b)	Should the first set of brackets be removed? Should the words in the second set of brackets be deleted or retained?	New Zealand / United States of America Japan / New Zealand / United States of America
Article 20 d)	Should the brackets be removed?	New Zealand / United States of America
Article 20 e)	Should the brackets be removed? Is redrafting required?	New Zealand United States of America
Article 20 f)	Is redrafting required?	United States of America
Article 20	Should there be a mandatory form for an application / request for recognition and enforcement?	Preliminary Document No 17, pp. 17-23

15. Authentic instruments and private agreements (Articles 15(4) and 25)

Article 15(4)	Certain States object to, reserve their position in respect of, or seek further clarification concerning the inclusion in Chapter V of authentic instruments and private agreements.	Japan / New Zealand / United States of America / Switzerland
Article 25	Should it be possible for States to opt-in to the provisions concerning authentic instruments and private agreements? Should the rules concerning direct applications (Art. 15(5)) apply to authentic instruments and private agreements?	New Zealand Footnote 30

Article 25(1)	Delete the words "or challenged"?	Canada
Article 25(3) a)	Should the wording be amended to read simply "the authentic instrument or the private agreement"?	Footnote 31

16. Enforcement of a decision for costs

Article 26	Should a provision be included such as that set out in Footnote 32?	European Community
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17. Applicable law

	Presentation and discussion of text submitted by the Working Group on Applicable Law	Report of the Working Group on Applicable Law – Preliminary Document No 22
	Specific applicable law rules in the main body of the Convention: Article 16(5) Article 27 Article 32(2)	See above, paragraph 10 Japan / New Zealand / Canada
	The instrument containing the general applicable law regime. What form should it take?	See Preliminary Document No 20

18. Language requirements and translation costs

Article 39	Should the brackets be removed, and are amendments required?	Japan / United States of America
Article 39(1)	Proposed additional sentence, viz.: "If requested, the maintenance decision should be accompanied by such a translation."	United States of America
Article 40(1)	Should the brackets be removed?	United States of America
Article 40(3)	Clarify whether translation costs under Article 39 can be passed on under this provision?	New Zealand

Article 40	Possible additional paragraph <i>viz.</i> : "If the requested State requires a translation of the entirety of the maintenance decision, in addition to the abstract of the decision, it should bear the cost of such translation."	United States of America
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19. Non-unified legal systems

Article 41	This Article has not yet been discussed in the Special Commission.	
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20. Co-ordination with other instruments

	<p>Possibility of additional Articles to deal with –</p> <ul style="list-style-type: none"> - co-ordination with prior Hague Maintenance Conventions - co-ordination of instruments and supplementary agreements - the most effective rule 	See Preliminary Document No 18 – Coordination between the Maintenance Project and other International Instruments
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21. Personal information

Article 33	Possible drafting changes	New Zealand / United States of America
Article 34	Possible drafting changes	United States of America
Article 35	Should brackets be removed? Should the provision be restructured / redrafted?	New Zealand United States of America / Canada

PART II – MATTERS NOT SPECIFIED ON DRAFT AGENDA

22. Table of contents

	Should a table of contents be added at the beginning of the Convention?	United States of America
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23. Preamble

Generally	The contents of the Preamble have not yet been fully considered by the Special Commission.	
Paragraph 1	Should the words "and judicial" be inserted after "administrative"?	Mexico

24. Article 1 - Object

Paragraph <i>b)</i>	Should a reference to "modification" be added?	United States of America
	Should this be made subsidiary to paragraph <i>a)</i> ?	Switzerland
Paragraph <i>d)</i>	Is "providing for" preferable to "requiring"?	New Zealand
	Should <i>d)</i> be merged with <i>c)</i> ?	

25. Article 3 - Definitions

Paragraphs <i>a)</i> and <i>b)</i>	See above under paragraph 3 Is the word "person" preferable to "individual"?	Mexico
Paragraph <i>c)</i>	Is clarification needed with regard to publicly funded legal assistance and private assistance?	New Zealand
	Difficulties regarding inclusion of "legal representation".	United States of America
	Difficulties regarding inclusion of legal advice.	Switzerland
	Should it be made clear that "legal assistance" comprises "some or all" of the matters enumerated?	

Paragraphs <i>d)</i> and <i>e)</i>	<p>Is a definition of residence necessary for Chapter III?</p> <p>Should the expression “where the applicant lives” be substituted for “in which the applicant has his or her [habitual] residence”?</p> <p>Further consideration is need concerning “habitual residence” or “residence”.</p>	<p>Paragraph 3 above</p> <p>Footnote 2</p> <p>Footnote 1</p>
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26. Article 14 – Limit on debtors bring proceedings

Article 14	Proposal to delete Article	Japan
	Delete reference to “debtor” in Chapter and Article heading.	United States of America / Canada
Article 14(1)	Insert after “any other Contracting State” the phrase: “in which the original decision can be recognised or enforced under the Convention”.	Footnote 20. Japan
Article 14(2)	Additional sub-paragraph to the same effect as above.	United States of America

27. Article 15 – Scope of Chapter on recognition and enforcement

Article 15(4)	See above, paragraph 15.	
Article 15(5)	See above, paragraph 13.	
Article 15(1)	<p>Add to end of second sentence: “and enforceable in the same manner as a judgment in the State of origin.”</p> <p>Remove brackets around “[retroactive maintenance]”.</p> <p>Should the terms “areas” and “retroactive maintenance” be defined?</p>	<p>New Zealand</p> <p>New Zealand / United States of America</p> <p>Footnote 21. New Zealand</p>

28. Article 17 – Severability and partial recognition and enforcement

Article 17	Clarification sought.	Japan
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29. Article 24 – Physical presence of the child or applicant

Article 24	Should the brackets or the text be removed?	New Zealand / United States of America / Switzerland
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30. Article 29 – Enforcement measures

Article 29	Should the brackets or the text be deleted?	Japan / United States of America
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31. Article 32 – Public bodies as applicants

Article 32	Redrafting suggested throughout.	Canada
Article 32(1)	Should there also be a reference to Article 13(5)? Is this paragraph necessary having regard to Article 2(2)? Would this provision be better located within the Article on definitions (Art. 3)?	United States of America Footnote 34
Article 32(3)	Is the language in brackets redundant?	United States of America. Footnote 35
Article 32(5)	Should the bracketed language be deleted? See also paragraph 9 above.	United States of America

32. Article 37 – Power of attorney

Article 37	Is rewording required? Should the brackets be removed? See proposal of the German Institute for Youth Human Services and Family Law.	Japan / Switzerland. See also paragraph 2 above. Working Document No 83
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33. Article 38 – Costs recovery

Article 38(1)	Should the principle apply only in respect of child support?	Footnote 36
	Further discussion needed concerning relationship between Articles 8(2), 26, 39 and 40?	New Zealand / Switzerland
Article 38(2)	Consider inclusion of a provision ensuring that costs may be recovered from unsuccessful party.	Footnote 37

34. Article 49 – Signature, ratification and accession

Article 49	Which options / alternatives within options should be retained?	United States of America
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35. Media neutral text

In particular Preamble and Articles 11, 14, 15 and 20	In relation to the use of terms such as "documents", "agreement in writing or evidenced in writing", "authentic instruments and private agreements", "original", "certified", "certificate", "sworn by", etc. is the text of the Convention media neutral?	Footnotes 14 and 27 Preliminary Document No 17, paragraph 8, p. 4 and Annex C, p. 15 Permanent Bureau Information Notes of 2003 and 2005 United States of America / Switzerland
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36. Chapter VIII –General Provisions

New Article	Should an Article be added similar to Article 30 of the 1980 Convention on the Civil Aspects of International Child Abduction?	Canada
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